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IN THE

Supreme Court of the United States

October Term, 1959

KARL L. PEDERSEN,

Petitioner,

AGAINST

THE TANKER BULKLUBE, her engines, tackle appurtenance, etc.,

Respondent,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent Impleaded

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States District Court for the Eastern District of New York is officially reported at 170 F. Supp. 462. The *per curiam* opinion of the Court of Appeals for the Second Circuit affirming on the opinion of the District Court is not officially reported but appears at pages 13-14 of the petition.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254(1). The petition however fails to specify why under the facts as have been found here, a writ should be granted, nor does it indicate that any genuine ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists in this case.

The Facts

Prior to June 22, 1952, National Bulk Carriers, Inc., as owner of the tank vessel *Bulklube*, decided to reconstruct her and rebuild her in accordance with the standards of the United States Coast Guard and the American Bureau of Shipping as a ship of general carriage. Accordingly, it made a contract with Todd Shipyards Corporation to take the vessel to Todds' own shipyard and rebuild her in accordance with approved plans and specifications. The work involved such extensive reconstruction that it amounted to a virtual rebuilding of the interior of the vessel. It required renewing her decks, burning out partitions and bulkheads which divided her into twenty-three tanks, making and installing new bulkheads and partitions, renewing the longitudinal and deck beams, reconditioning her engines, boilers, steering gear and all other machinery. The only parts of the vessel which were not removed and replaced were the shell of the ship and those members corresponding to the keel, including the keelson, the external structures of the vessel above the main deck, such as the bridge house, the bridge and the after housing.

In accordance with the contract National Bulk Carriers, Inc., as owner delivered the tanker *Bulklube* to Todd Shipyards Corporation on June 2, 1952 and Todd accepted such delivery. The master and crew were thereupon paid

off and none was thereafter maintained on the vessel until it was redelivered to National on December 19, 1952 when a new crew was engaged. During this period the only personnel of National Bulk Carriers who came on board were the former Chief Officer and National Bulk Carriers' Port Engineer who inspected the work when it was completed to see that it complied with the specification. They gave no orders and supervised none of the work. The former Chief Officer's working hours were from 8:00 a.m. to 5:00 p.m., five days a week. He signed no articles and was paid weekly the same as National's other shoreside employees. Sleeping quarters aboard ship were available for his convenience if he chose to use them. The Port Engineer on the other hand had no regular hours.

Under the contract Todd agreed to and in fact did provide all the necessary labor and material required for the completion of the work.

On August 8, 1952, on the date petitioner's accident occurred, about thirty to forty percent of the repair work under the contract had been completed. The engines of the tanker had been dismantled and were in the process of being repaired. The vessel could not steam under its own power. She was not fit to go to sea from the time she entered the Todd Shipyard, once active work was commenced on her, until it was completed.

With the vessel in this status and for the purpose of conducting the rebuilding work in which they had been engaged for some month and a half Todd's employees erected a staging by welding some metal brackets to the inside wall of one of the tanks and placing a plank across said brackets. National Bulk Carriers had no part whatsoever in construction of the staging or any of its component parts and had no knowledge or notice as to how the staging had been erected, or what its condition was, or

that it might be unsafe. In fact, there was no evidence in the case that National Bulk Carriers either had the occasion or the opportunity to observe or inspect the construction of the staging in question.

It appears that as the petitioner stepped on the staging one of the brackets supporting the staging collapsed and precipitated the petitioner to the bottom of the tank.

On the facts the court below found that the accident to the petitioner was due solely to the negligence of Todd in failing to properly construct the staging.

Petitioner however contended that even though the accident was caused by the negligence of his co-employees for which he could not sue his employer because his sole remedy against the employer was under the Longshoremen's & Harbor Workers Compensation Act, 33 U. S. C. 905 and giving due recognition to the decision of the court in *Berge* v. *National Bulk Carriers, Inc.*, 251 F. 2d 717, cert. denied 356 U. S. 958, that the warranty of seaworthiness did not extend to him he nonetheless could, by indirection, by resorting to an admiralty proceeding *in rem* against the vessel, obtain damages for his injuries.

In dismissing the libel the court below properly held that neither under the law nor under the facts could such a recovery be obtained. It concluded that under the law petitioner's accident created no maritime lien on the basis of which a recovery could be obtained *in rem*. It also found that under the law petitioner had no actionable right on the basis of which he could proceed either *in rem* or *in personam*. It further found as a fact that the vessel was not in navigation and that accordingly even if there might otherwise be a basis for a maritime lien, none could be enforced in this action.

It is respectfully submitted that both on the law and the facts the Court below was correct.

Questions Presented

1. Whether a harbor worker who is engaged in rebuilding a vessel and in the course thereof is injured solely through his employer's negligence and whose only recourse against such employer is limited to the remedy provided by the Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. 901, *et seq.* can circumvent such legislative enactment and recover damages against the property of an innocent shipowner merely because the property proceeded against happens to be a ship which for some purposes has been considered a distinct juridical entity.

2. Whether a shipyard to whom a vessel has been delivered for the purpose of having its interior rebuilt can through its negligence subject the vessel of an innocent shipowner to liability *in rem* when such vessel is not in active marine operation and is not being employed in navigation as an instrument of commerce.

3. Whether a court's finding as a fact that a vessel which is in a shipyard and which is not fit to go to sea because only thirty to forty percent of the rebuilding work has been completed was not in navigation and therefore not subject to a maritime lien for the tort liability of the non-owner shipyard was proper and correct.

The Argument

There are no issues in the present case which warrant review by this Court, and no amount of straining of a fictional concept can convert it into such a case. The petition involves nothing more than a veiled attempt to circumvent the provisions of the Longshoremen's & Harbor Workers Compensation Act (33 U. S. C. A. 901

et seq.) and obtain for petitioner a right of recovery which Congress clearly withdrew from workers such as petitioner when, as here, they incur injuries in the course of their employer's work solely through the negligence of such employer. The fiction under which for some purposes a ship has been treated as a distinct juridical entity affords no legal basis for the creation of a new theory of liability which circumvents the clearly manifested intent of Congress and would accomplish, in an indirect way, what petitioner is prohibited from doing directly.

The proposed liability in no sense concerns a tort arising from a breach of warranty to provide a seaworthy vessel. No such claim has been made in this case in due recognition of the decision in *Berge* v. *National Bulk Carriers* Inc., 2 Cir. (1958) 251 F. 2d 717, cert. denied 356 U. S. 958 (1958), where it has been held that the particular rebuilding work on the *S S Bulklube* in which petitioner was engaged but at a different time was not work traditionally done by seamen. See *United N. Y. & N. J. S. H. Pilots Assoc.* v. *Halecki* (1959), 358 U. S. 613.

The proposed liability also does not involve a claim based on any negligence of the shipowner or those for whom it has been held responsible under the law. This theory of liability is not applicable where, as here, the vessel is delivered to a shipyard for rebuilding or extensive repairs and the shipowner exercises no control over the vessel and places and methods of work. *West* v. *United States*, 361 U. S. 118. This theory of liability as a basis for recovery is also not urged by petitioner now.

Moreover the proposed liability does not concern a tort resulting from a defect in a shoreside contractor's equipment which is brought on board a vessel in active marine operation as a substitute for standard ship's equipment such as was involved in *Alaska S.S. Co.* v. *Petterson*, 347

U. S. 396. Liability in that case arose from a breach of warranty of seaworthiness on a vessel in active marine operation where the shipowner was in control and the equipment involved was standard ship's equipment furnished by a shoreside contractor for ship's work rather than a contractor's special gear which was needed for work not traditionally done by the ship. Under the facts of this case, no question of shipowner's liability is involved here. *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, 358 U. S. 613; *West* v. *United States*, 361 U. S. 118.

To focus attention on what type of liability is offered for determination by this Court, it may be pointed out that petitioner does not question that the tanker *Bulklube* was delivered to his employer, Todd, solely for the purpose of extensive repairs amounting to a virtual rebuilding of the interior of the vessel and that from the time active work was commenced on the vessel she was under Todd's control and not fit to go to sea until the work was completed. Nor does he question that at the time of his accident, only about thirty to forty per cent of the repair work under contract had been completed and that his accident was caused solely by the negligence of Todd in failing to properly construct a staging which was one of a series of such stagings that petitioner's fellow employees had erected in the vessel's tanks for use in rebuilding the interior of the vessel. It is likewise undisputed that the stagings and their supports, including those involved in petitioner's accident, were not standard ship's equipment; that the shipowner took no part in erecting these stagings or any of their component parts and had no knowledge or notice as to how they had been erected or what their condition was or whether they were safe on which to work or not.

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Under the facts established petitioner's claim does not in any sense involve a tort giving rise to any liability on the part of some third party be it a shipowner or his vessel. It concerns only petitioner's employer's liability and his responsibility therefor under the law. Such responsibility has been fixed by Congress and cannot be altered or extended by resorting to a convenient conceptual device such as a proceeding *in rem* the only object of which is, under appropriate circumstances, to carry a recognized right into effect and not to circumvent the law and thereby create a right which the law does not otherwise recognize. Petitioner is therefore relegated to his remedy under the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. A. 901 *et seq.*) and no amount of strained semantics can confer any other right upon him.

On the facts and the law, therefore, the decision of the District Court was manifestly correct and the affirmance by the Court of Appeals was proper. There is no asserted conflict of decisions, nor in the light of the legislative history of the Longshoremen's & Harbor Workers Compensation Act (33 U. S. C. A. 901 *et seq.*) could any other result have been reached. Manifestly there is no special or important issues for review by this court.

POINT I

Petitioner's remedy for injuries sustained through the fault of no one but his employer is limited to the Longshoremen's & Harbor Workers' Compensation Act.

The only remedy which the law allows a harbor worker, such as the petitioner, when he sustains injuries in the course of his employment as the result of his employer's negligence is that provided by The Longshoremen's &

Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.* In enacting this legislation, it was the purpose of Congress to give to harbor workers a substantial *quid pro quo* in the form of assured compensation as a substitute for their excluded claims which included the right to sue for an employer's negligence. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U. S. 124, 129. These benefits constitute the limit of the employer's liability even where the harbor worker may be in the employ of the shipowner, or the one who may be lawfully in possession of the vessel in active marine operation. *Seas Shipping Co. v. Sieracki*, 1946, 328 U. S. 85, 102; *Swanson v. Marra Bros.*, 1946, 328 U. S. 1, 6. As was pointed out by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 102 and *Swanson v. Marra Bros.*, 328 U. S. 1, 6, the Act substituted its remedy for any right that might have existed in favor of a harbor worker to recover damages for the negligence of his employer. In this connection in *Swanson v. Marra Bros.*, 328 U. S. 1, 6, this Court said:

> "* * *. The liability of employers to pay the prescribed compensation is, by Sec. 905, made 'exclusive and in place of all other liability of such employer to the employee', his legal representative and any other person entitled to recover damages 'at law or in admiralty' from the employer for the injury or death. * * *."

The Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. C. 901 *et seq.*, cannot be circumvented either by fictional concepts or by distinctions based upon such elements as the place of injury. *Swanson v. Marra Bros.*, 328 U. S. 1, 6-7. To circumvent the Act, as petitioner urges here, would as this Court pointed out in *DeZon v. American President Lines* (1943) 318 U. S. 660, 672, be contrary to its function. It is not this Court's province to

devise theories of liability which will circumvent the legislative will and enable the petitioner to by-pass the rights which the legislature deemed proper to fix. Even had this Court such power under certain circumstances, it could not circumvent the Compensation Act because it is affected with a public interest, *Baltimore & P. Steamboat Co. v. Norton*, 284 U. S. 408, 414; *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U. S. 356.

POINT II

A proceeding *in rem* cannot create a right to recover damages where no such right is recognized or given under the law.

In the absence of any legal right to sue for his employer's negligence, a proceeding *in rem* cannot create a right which does not otherwise exist. A proceeding *in rem* is not a mere matter of procedure, but requires a right in property such as a maritime lien before it can be properly invoked. *The Lottawanna*, 88 U. S. (21 Wall.) 558, 579, 581. The lien or right in property and the proceeding *in rem* are correlative and one is of no effect without the other. In this connection, in *The Rock Island Bridge*, 6 Wall (U. S.) 213, this court pointed out at page 215:

> "* * * The only object of the proceeding in rem is to make this right (maritime lien), where it exists, available to carry it into effect. It subserves no other purpose.
>
> "The lien and the proceeding in rem are therefore, correlative—where one exists, the other can be taken and not otherwise. * * *."

To be the subject of a proceeding *in rem* it is essential that the claim is one which gives rise to a maritime lien under the law. None can be implied as petitioner seeks to urge here. In *Plumals* v. *Pinar Del Rio*, 277 U. S. 151, 156, this Court pointed out that because maritime liens are *stricti juris*, they cannot be extended by construction, analogy or inference simply because under what might appear to be similar circumstances they may have been invoked. Certainly the fiction that for some purposes a vessel has been considered a distinct juridical entity affords no justification for subjecting a shipowner's property to a liability to which under no concept of law could the shipowner otherwise be subjected, purely because the property sought to be reached happens to be a ship. It violates the admonition of this Court in *The Eugene F. Moran*, 212 U. S. 466, when it said at page 474:

> "* * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached (citing cases)."

It is also contrary to the holding of this Court in *Crowell's Import Co.* v. *Kabushiki K K. Zosen*, 320 U. S. 230, where, although a different statutory provision was involved, the same attempt was made to circumvent the statute by employing the fiction that a vessel be considered a distinct personality from its owner. This Court there said at page 233:

> "* * * To say that an owner is not liable, but that his vessel is liable, seems to us like talking in

> riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age.''.

It therefore follows as a necessary legal consequence that since petitioner has no right cognizable under the law which allows him to recover for the negligence of his employer, no liability can be enforced against the vessel *in rem* even though his employer may have been in possession of the vessel at the time in question.

POINT III

Negligence by one who is in control of a vessel but not on board for the purpose of employing the vessel in navigation as an instrument of commerce and not using the vessel for that purpose creates no maritime lien.

The decision below in no sense narrows or constricts applicable decisions of this Court, is not in conflict with them in principle and is not in conflict with decisions of any of the Courts of Appeal. Each case referred to deals with a vessel in active marine operation and concerns torts or events occurring in connection with the employment of the vessel in navigation as an instrument in commerce. The opinion of the trial court is clear and logical and respondent adopts the reasoning of the Court on this point when it said:

> * * * Each of the cases upon which the libellant relies, e.g., The Barnstable, 181 U. S. 464, 21 S. Ct. 684 (1901); The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544 (1889); The China, 7 Wall. 53, 19 L. Ed. 67 (1869), is concerned with the consequences flowing from the negligent operation of a vessel in navigation as an instrument of commerce. None

goes so far as to hold a vessel liable for injuries received by a workman engaged in work involving a virtual rebuilding of the whole interior of a vessel which has been temporarily withdrawn from navigation. In the absence of authority to do so, this court is not disposed to so hold. Cases such as The Owyhee, 60 F. 2d 641 (E. D. N. Y. 1932), affirmed 66 F. 2d 399 (2nd Cir. 1933), cited by the libellant, to the effect that there may be a lien for the unpaid balance of the agreed price of repairs upon a vessel which is being 'rebuilt' are not authority for the proposition that a vessel (382) itself is liable to a contractor's employee who is injured through the negligence of his fellow employees in the course of such rebuilding" (App., pp. 56a, 57a).

In fact in *The Kate Cann*, 2 Fed. 241, affirmed 8 Fed. 519, which is one of the cases which petitioner urges is in conflict with the decision below, the Court specifically noted that liability *in rem* for negligence could arise only out of the employment of the vessel in navigation as an instrument of commerce. It said at pages 244-245:

"Such a liability, in my opinion, exists where damage arises from the neglect on the part of the owner of a ship to discharge any duty arising on navigable waters out of the employment of the ship as an instrument of commerce, and owing to the person injured. If, then, it appears in this case that there was a duty owing to the libellant in respect to the manner of stowing the dunnage and plank that fell upon him, and it also appears that such duty arose out of the employment of the ship as an instrument of commerce, and to be performed on navigable waters, the jurisdiction of this court to condemn the ship, and the right of the libellant to

require that the ship be held to be charged with the damages caused to him by the omission of that duty, must be upheld."

Certainly in *The China*, 7 Wall 53, when the collision occurred the vessel was in navigation as an instrument of commerce and although it was under the command of a compulsory pilot, liability was visited upon the vessel because of the neglect of those who were in command of her navigation while she was engaged as an instrument of commerce.

An examination of the other cases such as *United States* v. *Brig Malek, et al*, 43 U. S. 210; *The Barnstable*, 181 U. S. 464; *The John G. Stevens*, 170 U. S. 124; *The Max Morris*, 137 U. S. 1; *The Kate Cann*, 2 F. 241, aff'd 8 F. 2d 134, shows that the tort or violation arose during the employment of the vessel in navigation as an instrument of commerce.

The fact that the vessel was in the control of the shipyard employer affords no basis for circumventing the Compensation Act. The employer's relationship was not the same as that of the charterer in *The Barnstable*, 181 U. S. 464 and *Turner* v. *United States*, 27 F. 2d 134, who took possession for the purpose of using the vessel in navigation as an instrument of commerce. Petitioner's employer on the other hand was in possession only so that he could rebuild the vessel at his shipyard and his only purpose for retaining such control was so that he could perform work aboard that traditionally was not and could not be done by seamen. *Berge* v. *National Bulk Carriers, Inc.*, 2 Cir., 251 F. 2d 717, cert. den. 356 U. S. 958.

The principles governing a shipyard's relationship to the vessel are clearly different from those of a charterer in possession and differ in the purpose for which each may

be in possession. The status and the relationship of a demise charterer such as was involved in *The Barnstable*, 181 U. S. 464 and *Turner* v. *United States*, 27 F. 2d 134, was defined in *The Kongo*, 6 Cir., 155 F. 2d 492, 495, cert. denied 392 U. S. 735, as follows:

> "* * * The contract let the whole of the vessel with a transfer to the Barge Lines of its entire command and possession and consequent control over its navigation. This amounted to a demise or lease of the vessel. Cf. United States v. Hvoslef, 237 U. S. 1, 16, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286. In such case the charterer is a special owner (United States v. Shea, 152 U. S. 178, 189, 190, 14 S. Ct. 519, 38 L. Ed. 403), and is to be considered owner for the voyage and service stipulated. Reed v. United States, 11 Wall. 591, 600, 78 U. S. 591, 600, 20 L. Ed. 220; Leary v. United States, 14 Wall. 607, 610, 81 U. S. 607, 610, 20 L. Ed. 756 * * *."

Obviously such a demise of a vessel clearly gives rise to a different relationship than that which arises when a vessel is removed from navigation and turned over to a shipyard so that a shipyard can rebuild her. In fact, this Court only recently in *Mitchell* v. *Trawler Racer, Inc.*, U. S. : (Decided May 16, 1960), acknowledged that there was a clearly recognizable distinction between the rights of an employee injured on a vessel in active marine operation and those existing when the vessel was not so employed.

Grillea v. *United States*, 232 F. 2d 919, affords no basis under the facts for circumventing The Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. C. 901, *et seq.* In the first place that case was concerned with a shipowner's liability for failing to furnish a seaworthy vessel,

which theory has no application to this case. Secondly the vessel at the time was not being rebuilt but was in active maring operation and the injured employee was aboard the vessel performing work traditionally done by the ship's crew. Furthermore, there was a specific agreement that the charterer employer would indemnify the owner against any lien arising out of the operation of the vessel by the charterer.

No such agreement existed in the present case. In view of this the trial court was constrained to and did follow the decision of the Court of Appeals for the Second Circuit in *Bennett* v. *The Mormacteal*, 254 F. 2d 138, cert. den. 358 U. S. 817, which was decided subsequent to Grillea. It held that in the absence of such agreement as is the case in the present action an employee could not sue his employer who was in control of the vessel, for negligence.

Obviously therefore the decision below is not in conflict with any decisions or principles defined by this Court nor with any decision in this circuit or any other circuit. See *Bennett* v. *The Mormacteal*, 2 Cir., 254 F. 2d 138, cert. den. 358 U. S. 817; *Smith* v. *The Mormacdale*, 3 Cir., 198 F. 2d 849; *Samuels* v. *Mason S.S. Line*, 5 Cir., 63 F. 2d 861.

POINT IV

The finding by the Trial Court that the vessel was not in navigation and therefore not the subject of a maritime lien is conclusive and cannot be disturbed.

The petition advocates a further fallacy that because a vessel may at the time be in the water it is in navigation and therefore the subject of a maritime lien regardless of what the actual status is and the purpose for which

it is being used at the time. It is clear from the decision of this Court in *West* v. *United States*, 361 U. S. 118, that the status of the vessel as well as the nature of the work which is being performed at the time are vital considerations in determining the question of a ship's liability, if any. These facts are also evident from this Court's comment in *Mitchell* v. *Trawler Racer, Inc.*, U. S. (Decided May 16, 1960).

While it is true that in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, the vessel, which was held not to be in navigation, was in a drydock, that is not the determining factor in deciding whether a vessel is in navigation or not. It is obvious that when in the *Desper* case this Court cited the decisions in *Hawn* v. *America S.S. Co.*, 2 Cir., 107 F. 2d 999, 1000; *Seneca Washed Gravel Corp.* v. *McManigal*, 2 Cir., 65 F. 2d 779, 780 and *Antus* v. *Interocean S.S. Co.*, 6 Cir., 108 F. 2d 185, 187, where the vessels had been held not to be in navigation though in the water, in support of its holding, that mere presence in the water did not confer on a ship the status or obligations of a vessel which is in navigation and being used as an instrument of commerce.

A vessel in such a status is incapable of giving rise to a maritime lien and when a court finds as a fact that the vessel is withdrawn from navigation, such finding cannot be ignored or disturbed unless it is clearly erroneous. The issue as to whether a ship is in navigation or not is one of fact and not a matter of law. *Butler* v. *Whitman*, 356 U. S. 271. Since petitioner has failed to show that such finding was clearly erroneous it cannot be disturbed. *McAllister* v. *United States*, 348 U. S., 19, 22-23; *Cramady* v. *Joachim Hendrik Fisser*, 358 U. S. 423, 428.

What may have been the vessel's status before she was delivered to the shipyard or after she was redelivered

to the respondent-claimant is of no significance. At the time of petitioner's accident the rebuilding was only thirty to forty percent completed and that is what determines the status of the vessel and the fact that she was not in navigation and therefore insofar as tort liability is concerned, she could not be the subject of a maritime lien.

CONCLUSION

The decision of the Court below is therefore correct and presents no conflict of decisions nor any important issues for determination by this Court and the petition should accordingly be dismissed.

Respectfully submitted,

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